Filed 5/31/16 In re A.H. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.H., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.M., Defendant and Appellant.	E064849 (Super.Ct.No. RIJ1300930) OPINION

APPEAL from the Superior Court of Riverside County. Donna L. Crandall (retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Jacqueline C. Jackson, Judges. Affirmed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, Julie Koons Jarvi, Deputy County Counsel for Plaintiff and Respondent.

Defendant and appellant M.M. (mother) is the mother of A.H. (minor; a boy, born March 2015). On appeal, mother challenges the termination of her parental rights as to minor by the juvenile court under Welfare and Institutions Code[1] section 366.26. For the reasons set forth below, we shall affirm the trial court's judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FAMILY BACKGROUND

On April 28, 2015, the Department of Public Social Services (Department) received a referral indicating that mother gave birth to minor at home, with the maternal grandmother's assistance. Mother did not receive prenatal or postnatal care for minor. Mother also failed to take minor in for a medical examination or to apply for a birth certificate. The social worker spoke with mother; mother stated that she was scared Child Protective Services would take her newborn if she went to the hospital to give birth. Mother admitted using methamphetamine. She was unemployed and did not have the necessary provisions for the baby. Mother and minor's father[2] decided to leave minor with the maternal aunt and grandmother.

The social worker went to the maternal grandmother's home to locate minor. The maternal grandmother and aunt reported that they had been the primary caregivers for minor for approximately one month; mother visited only once. The maternal aunt had been involved with the Department. She, however, recently had her children returned to

[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

[2] Minor's father is not a party to this appeal.

her, and the Department closed her dependency case. The maternal grandmother also had a prior dependency case with the Department. The Department took minor into protective custody.

Mother had older children. The court awarded sole legal and physical custody of A.M. (a boy, born 2010) to his father. The court granted mother professionally supervised visitation pending a clean drug test and mental health assessment. Mother gave birth to C.M. (a girl) in August 2013; both mother and C.M. tested positive for amphetamines and marijuana. Mother received services for C.M. The services, however, were terminated because of mother's minimal efforts. On September 15, 2014, the court terminated mother's parental rights as to C.M.

On May 21, 2015, a section 300 petition was filed as to minor. The Department alleged that minor came within section 300, subdivisions (b) and (j). Mother did not appear at the detention hearing on May 22, 2015. The court detained minor.

According to the jurisdiction/disposition report, mother did not make herself available to the social worker and declined to be interviewed. Mother visited minor twice a week in a supervised setting. She was attentive and tended to minor. Mother missed some visits. She also continued to test positive for substances.

Mother visited with minor on June 2015. Other scheduled visits in June were cancelled for various reasons. Mother either failed to show, or showed up late and the visits were cancelled. Mother also tested positive for substances causing some visits to be cancelled. Since the visit in June, no more visits occurred because mother failed to contact the Department.

Mother failed to appear at the hearing on June 15, 2015. A contested hearing was set. Mother again failed to appear at the contested jurisdictional hearing held on July 14, 2015. Mother's counsel informed the court that she had sent letters to mother requesting that mother be present at the hearing. Mother's counsel informed the court that she was unable to address any of the allegations or recommendations because she had not met mother. Counsel requested to be relieved as mother's counsel; the court granted the request. The court sustained the petition and found that minor came within section 300, subdivisions (b) and (j). Minor was adjudged a dependent of the court. Minor was removed from mother's care and mother was denied services. A section 366.26 hearing was set. Visitation was reduced to a minimum of once per month.

The Department provided notice of the section 366.26 hearing to mother by first class mail to her address in Perris. A Non Service Report indicated that personal service was attempted on three occasions (September 19, 22, and 26, 2015), at the Perris address. In each instance, the property was fenced and padlocked, and no activity was seen or heard. On the first attempt at personal service, there was an aggressive dog in the yard.

An Application for a Finding of Due Diligence as to mother was filed on October 16, 2015. The Department had been unable to ascertain the whereabouts of mother. On or about October 1, 2015, the Department completed a search for her without success.

A social services assistant with the Department, Sheila Brewster spoke with mother on the telephone on October 1, 2015. Brewster informed mother about the upcoming court date for terminating her parental rights; mother stated she was aware of

it. Mother was moving out of the Perris address that day. After moving out, mother would be homeless.

On October 16, 2015, a Citation to Appear was filed. It was signed on August 20, 2015. The notice by publication is in the record.

Minor was placed in a prospective adoptive home on August 27, 2015. The prospective adoptive parent was committed to providing minor with a permanent, stable and loving home. Minor was well bonded to his prospective adoptive family. He was a "happy, well adjusted, and a well cared for child. He [was] thriving in the home."

Mother was provided with notice of a review hearing pursuant to section 366.3, scheduled for November 12, 2015, the same day as the section 366.26 hearing.

Mother failed to appear at the combined section 366.26 and 366.3 hearing. At the hearing, the court terminated mother's parental rights. The same day, mother filed her notice of appeal.

DISCUSSION

A. ANY ALLEGED ERROR RELIEVING MOTHER'S COUNSEL WAS HARMLESS

Mother argues that the court improperly relieved her attorney without cause or notice to her. The Department argues that mother has forfeited her challenge to the court's order because she failed to file a writ following the order. We need not address the forfeiture argument because mother's argument fails on the merits.

An indigent parent does not have a general due process right to the assistance of court-appointed counsel at all stages of a state-initiated juvenile dependency proceeding, under the federal or state Constitution. (*Lassiter v. Department of Soc. Serv. of Durham Cty.* (1981) 452 U.S. 18, 31-32; *In re Sade C.* (1996) 13 Cal.4th 952, 986-987.)

Once counsel is appointed, however, under section 317, subdivision (d), "[c]ounsel shall represent the parent . . . at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent . . . unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent . . . in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship."

In this case, the juvenile appointed counsel for mother at the detention hearing on May 22, 2015. At the continued contested jurisdictional hearing on July 14, 2015, mother's counsel requested to be relieved as counsel because she was unable to represent mother. Counsel stated: "Mother has not appeared in this court. Apparently she had been contacted by the Department. I have sent her out letters requesting her to be here at the court hearing, giving her my information. But, unfortunately, she still is not here. I had represented her previously, that's why I did take appointment. [¶] But at this time, I am not able to address any of the allegations or the recommendations due to not having a client. So I am asking to be relieved." The court granted counsel's request.

On appeal, mother complains that mother's counsel "was improperly relieved, without cause and without notice to [mother]." Assuming arguendo that mother's counsel was improperly relieved, any error was harmless. "[T]he violation of a parent's

statutory right to counsel in dependency proceedings is reviewed under the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836." (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195, italics omitted.) "With respect to a parent's assertion of a violation of the statutory right to representation or the statutory right to adequate representation, the parent must also show 'it is "reasonably probable . . . a result more favorable to the appealing party would have been reached in the absence of the error."'" (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152.)

In this case, mother has failed to show that she suffered any prejudice by the court's order relieving her counsel. At the hearing where mother's counsel was relieved, the court found that minor came within section 300, subdivisions (b) and (j). The court also denied services to mother under section 361.5, subdivisions (b)(1) and (b)(11). On appeal, mother makes no argument that the results of the hearing would have been different had she been represented by counsel.

Moreover, mother makes no argument that her parental rights would not have been terminated had her attorney not been relieved. Mother does not suggest that the court erred in finding that minor was likely to be adopted or that any of the exceptions to the termination of parental rights applied in this matter. Mother last visited minor in June 2015. Minor was placed in a prospective adoptive home on August 27, 2015. Already being placed in a prospective adoptive home is sufficient evidence to show that minor will likely be "adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650.)

In *In re Malcom D.* (1994) 42 Cal.App.4th 904, the court found that, although the juvenile court violated the mother's statutory right to counsel by relieving her attorney at the section 366.26 hearing, the error was harmless. (*Malcolm D.*, at p. 908.) The court found it noteworthy that minor had counsel in the trial court proceedings. (*Id.* at p. 920.) The court stated that minor's counsel could have addressed any question concerning the adoptability finding. Minor's attorney did not contest the proposed termination of parental rights. The attorney also did not contest the social service department's recommendations and orders. The appellate court, therefore, determined that "it [was] not reasonably probable that the court would have issued orders more favorable to the mother had she been represented by counsel at the section 366.26 hearing . . . ." (*Id.* at p. 921.)

The facts in this case are similar to the facts in *In re Malcom D.*, *supra*, 42 Cal.App.4th 904. Here, minor was represented by counsel in the proceedings below. At the section 366.26 hearing, minor's counsel did not object to the recommendation that parental rights be terminated. Because minor was represented through the proceedings, as was the minor in *Malcom D.*, minor's counsel could have addressed concerns regarding his adoptability status. Because his counsel did not contest the recommendations and orders, we find that it was not reasonably probable that the juvenile court would have issued orders more favorable to mother had she been represented by counsel. Therefore, we find any alleged error harmless.

B. THE DEPARMENT'S FAILURE TO COMPLY STRICTLY WITH THE NOTICE REQUIREMENTS FOR THE SECTION 366.26 HEARING WAS HARMLESS BEYOND A REASONABLE DOUBT

Mother contends that she was not properly notified of the section 366.26 hearing.

"In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend." (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114 (*Jasmine G.*).) In addition, "notice of a selection and implementation hearing is mandated by statute." (*Ibid*.)

Once the court schedules a hearing under section 366.26, the parents must be noticed pursuant to subdivision (f) of section 294, which reads in part as follows: "(f) Notice to the parents may be given in any one of the following manners: [¶] (1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only. [¶] (2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent. [¶] (3) Personal service to the parent named in the notice. [¶] (4) Delivery to a

competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered." If a parent's whereabouts is unknown and cannot be determined with reasonable diligence, the petitioning agency must file an affidavit with the court seeking service by some other means as specified in subdivision (f)(7) of section 294.

Mother contends that "the notice of the section 366.26 hearing provided by the Department failed to comply with the requirements of section 294." In this case, there were multiple attempts to serve mother personally at her last known address—on September 19, 22, and 26, 2015—under section 294, subdivision (f)(3). Because attempts to personally serve mother were unsuccessful, the Department filed a declaration of diligence requesting the court find that the Department had exercised due diligence in attempting to notify mother of the scheduled section 366.26 hearing. On October 14, 2015, the court found that the Department has exercised due diligence in attempting to locate and serve mother. Therefore, the Department was authorized to give notice of the section 366.26 hearing to parents by publication.

Mother claims error because (1) the notice of hearing was mailed to her via first class mail, instead of certified mail with a return receipt signed by mother; and (2) the social worker made no attempt to arrange to serve mother after making telephone contact with her. However, under section 294, subdivision (f)(7), the Department was allowed to give notice via publication since the court determined that the Department exercised reasonable due diligence to locate and serve mother. In her opening brief, mother argued

that the publication notice was untimely because it should have been published 75 days before the section 366.26 hearing. In her reply brief, however, mother conceded that the notice only needed to be published 30 days before the hearing. Nonetheless, mother argues that the notice was still insufficient because "the Department failed to file a due diligence affidavit with the court at least 75 days prior to the November 12, 2015, hearing, as required by section 294, subdivision (f)(7)." Here, the application for a finding of due diligence as to the section 366.26 hearing was filed on October 16, 2015. We agree with mother that it was not 75 days prior to the section 366.26 hearing. We also agree with mother that "[t]his is a very minor point. It is not central to the challenge presented in [mother's] opening brief."

Here, even if notice can be found insufficient because the application for a finding of due diligence was not filed 75 days prior to the section 366.26 hearing, we find any such error to be harmless beyond a reasonable doubt. "Notice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend." (*Jasmine G., supra*, 127 Cal.App.4th at p. 1114.) Parameters for notice of a selection and implementation hearing under section 366.26 are contained in section 294. On appeal, we apply the harmless beyond a reasonable doubt standard of review. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394.) According to *In re Daniel S.* (2004) 115 Cal.App.4th 903, "Errors in notice do not automatically require reversal. [Citation.] We review such errors to determine whether they are harmless beyond a reasonable doubt." (*Id.* at pp. 912-913, fn. omitted.)

Here, mother acknowledges that the Department made multiple attempts to personally serve mother, but was unsuccessful. The Department, therefore, published notice in a newspaper in an attempt to notify mother of the section 366.26 hearing. Moreover, mother does not refute that the social worker assistant personally told mother via telephone about the hearing. The application for a finding of due diligence noted that a social services assistant did make contact with mother on October 1, 2015, via telephone: "I informed [mother] of the court date for terminating parental rights; she said that she was aware of it. I asked her for her address; she replied that she is moving out of the . . . Perris address today. She will then be homeless in Perris. . . . Lastly, I provided her with the CSSW's name and number." Therefore, it is unrefuted that mother had actual notice of the hearing. Notwithstanding this actual notice, mother failed to appear.

Furthermore, mother fails to explain how the results of the section 366.26 hearing would have been different if the Department had filed the application for finding of due diligence 75 days prior to the section 366.26 hearing. Mother even acknowledges in her brief that the results of the proceedings would have been the same in this matter. She states that "in light of [mother's] problematic history, and her historic failure to participate in the proceedings the evidence in the record leaves little reason to believe that the outcome of this case would have been impacted by strict compliance with the requirements of section 294."

In sum, we find that any minor error in the Department's failure to comply strictly with section 294 was harmless beyond a reasonable doubt.

C. THE ALLEGED ERRORS ARE NOT STRUCTURAL ERRORS

Mother claims that the alleged combined errors were structural and automatic reversal of the order terminating her parental rights is required. Mother suggests that the combination of her counsel being relieved coupled with the alleged noticing error results in a structural error requiring automatic reversal.

To be characterized as a structural defect, a constitutional error must be so pervasive and debilitating as to contravene the very essence of the legal system. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Thus, the category of structural error has been reserved for a very limited class of cases, including the total deprivation of the right to counsel at trial and trial before a judge who is biased. (*Ibid*.) A structural defect affects "the framework within which the trial proceeds." (*Ibid*.) The common denominator of structural errors is that they infect the entire conduct of the trial "*from beginning to end*." (*Id*. at pp. 309-310, italics added.) In short, an error may be properly categorized as structural only if it so fundamentally undermines the fairness or the validity of the trial that the result must be voided regardless of identifiable prejudice. (*Yarborough v. Keane* (1996) 101 F.3d 894, 897.)

"Trial error," in contrast, is error that occurs during the presentation of the case. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 555.) "An error that occurs during the trial process itself does not require automatic reversal because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless." (*Id*. at p. 554.) Indeed, even a constitutional error "as a general rule does not automatically require reversal. In determining the effect

of 'most constitutional errors,' appellate courts can properly apply a *Chapman* harmless error analysis." (*In re Angela C.*, *supra*, 99 Cal.App.4th at p. 394.)

Additionally, "the California Supreme Court has cautioned against using the structural error doctrine in dependency cases. In *In re James F.* (2008) 42 Cal.4th 901 [(*James F.*)], the Supreme Court explained that the concept of structural error was developed in criminal cases." (*In re A.D.* (2011) 196 Cal.App.4th 1319, 1326.) The Supreme Court noted that there were significant differences between criminal proceedings and dependency proceedings, which provided "reason to question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases." (*James F.*, at pp. 915-916.)

In this case, mother argues that the combination of errors is "comparable to cases where no effort to notice a parent is made." In support, mother relies on *Jasmine G.*, *supra*, 127 Cal.App.4th 1109. This case, however, is distinguishable from *Jasmine G.*

In *Jasmine G.*, the court of appeal reversed the section 366.26 orders terminating parental rights. The court found that mother was not noticed under section 294. There, the mother did not attend the hearing where the section 366.26 was set. The Department filed the same declaration for finding of due diligence in search of the mother at the section 366.26 hearing, as the one filed more than six months earlier at the review hearing. Between the hearings, the social worker spoke to the mother numerous times and met with her on one occasion. The Department had a possible address for the mother but failed to follow up. The appellate court stated that the Department "made no attempt,

absolutely none, to even *look* for [the mother] after the six-month review. It simply resubmitted the November 2003 search declaration to show compliance with the *later* December 2003 order to serve notice of the upcoming hearing." (*Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1116.) Although the mother's attorney was notified of the section 366.26 hearing, the court reversed the finding because "the failure to attempt to give a parent statutorily required notice of a selection and implementation hearing is a structural defect that requires automatic reversal." (*Jasmine G.*, at p. 1116.)

Here, the facts are distinguishable. In this case, as provided above, after the six-month review, the Department continued its efforts to notify mother of the section 366.26 hearing. The Department mailed mother a notice, attempted to personally serve mother on three separate occasions, and spoke with mother and gave her the date of the section 366.26 hearing. Moreover, notice was provided to mother by publication. The Department filed a new application for finding of due diligence summarizing the new attempts to contact mother. The Department did not refile its statement of due diligence, used months prior.

Moreover, *Jasmine G.* was decided prior to the California Supreme Court's decision in *James F.*, where the Supreme Court cautioned against using the structural error doctrine in dependency cases. The court noted:

"[T]he United States Supreme Court has explained that most structural defects 'defy analysis by "harmless-error" standards.' [Citation.] Errors that can 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt' [citation] generally are not

structural defects. (See *United States v. Gonzalez-Lopez*[(2006)] 548 U.S. [140,]149, fn. 4 . . . ['here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error'].)" (*James F., supra*, 42 Cal.4th at p. 917.)

The California Supreme Court stated that prejudice was not "irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child." (*James F., supra*, 42 Cal.4th at p. 917.) "If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required." (*Id.* at pp. 918-919.)

Even mother acknowledges that "the notice errors here appear to be quite minor and technical, standing alone." Mother, however, contends that this error, combined with the "erroneous grant of Attorney Hasler's request to be relieved" rises to the level of structural error. We disagree. As noted above, mother has failed to provide any evidence on how the proceedings might have differed had mother continued to be represented by counsel. Relief of mother's counsel did not affect notice given to mother. Again, the record is clear that the Department made notable efforts to notify mother about the section 366.26 hearing. And, mother had actual notice about the hearing. Although mother attempts to argue that "the combined errors in this case are comparable to cases where no effort to notice a parent is made," the evidence in this case does not support mother's argument.

As discussed above, any alleged errors in this case are harmless. The evidence showed that minor was likely to be adopted and that no exception to the termination of parental rights applied. Mother failed to appear at all hearings, and stopped visiting minor months prior to the hearing on review.

DISPOSITION

The judgment terminating mother's parental rights is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.